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IN THE

Supreme Court of the United States

October Term, 1963

No. 617

In the Matter of the Application of

ROBERT B. BLAIKIE

individually and on behalf of others similarly situated as duly qualified elector and voter,

Appellant,

against

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and JOHN R. CREWS, as Commissioners of Elections of the City of New York constituting the Board of Elections in the City of New York and THE CITY OF NEW YORK,

Appellees,

for an order restraining the conduct of a general election in the year 1963, for the office of Councilman-at-large in the City of New York and declaring unconstitutional, invalid, null and void Section 22 of the New York City Charter entitled "Composition of Council."

MOTION TO DISMISS OR AFFIRM

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for an order restraining the conduct of a general election in the year 1963, for the office of Councilman-at-large in the City of New York and declaring unconstitutional, invalid, null and void Section 22 of the New York City Charter entitled "Composition of Council."

MOTION TO DISMISS OR AFFIRM

The appellees, The Board of Elections of the City of New York and the City of New York, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss this appeal on the ground that no substantial federal question is presented to warrant further argument or, in the alternative, that the judgment entered upon the remittitur of the Court of Appeals of the State of New York be affirmed.

Charter Provision Involved

The challenged Charter provision, Section 22 of the New York City Charter, is set forth in Appendix B of the appellant's jurisdictional statement. The statute in question, adopted by the voters of the City of New York on November 7, 1961, was designed, among other things, to permit minority representation with respect to the office of councilman at large through a system of limited voting.

Question Presented

The sole issue for determination is whether those provisions of Section 22 providing for the election of two Councilmen at large from each of the City's five boroughs, limiting each party or independent body to the nomination of not more than one candidate for such office, and providing that each elector shall have the right to vote for not more than one candidate for such office violate the Fourteenth Amendment of the United States Constitution.

Statement of the Case

Appellant instituted this proceeding for (1) a declaration that Section 22 of the New York City Charter violates both the Constitutions of the United States and of the State of New York and, (2) an order enjoining the defendants from conducting a general election for the office of Councilman at large in the City of New York in the year 1963. The proposed appeal seeks a review of the judgment, entered upon the remittitur of the New York Court of Appeals affirming the order of the Appellate Division, First Judicial Department of the New York Supreme Court, which dismissed the proceeding.

History of Charter Section 22

The New York City Charter was adopted by the New York City voters pursuant to the provisions of Chapter 87 of the Laws of 1961. Under the express provisions of that chapter, the following two questions were submitted to the voters:

1. "Shall the proposed new city charter recommended by the City Charter Revision Commission be adopted?"

2. "Shall the system of limited voting for the election of Councilman at large, provided for in the charter proposed by the Charter Revision Commission of the City of New York, be adopted?"

Both questions received a majority of affirmative votes at the polls.

The Charter approved under Question 1 contained a Section 22 which provided as follows (Proposed Charter for the City of New York, filed with the City Clerk, August 4, 1961, p. 3):

"Composition of Council

§22. a. The council shall consist of the president of the council and of other members termed councilmen.

b. One councilman shall be elected from each senate district as now or hereafter constituted lying wholly or partly within the city and *two councilmen shall be elected at large from each of the boroughs.*

c. The first election of councilmen at large shall be held at the general election in the year nineteen hundred sixty-three and the terms of the councilmen so elected shall expire coterminously with those of the councilmen then in office." (Emphasis supplied.)

The system of limited voting, approved under Question 2, by its terms superseded Section 22 approved under Question 1 (cf. Appendix A). Both Section 22, adopted pursuant to Question 1, and alternative Section 22, adopted pursuant to Question 2, contained identical provisions for (a) the election of one Councilman from each senate district, (b) the election of two Councilmen at large from each of the five boroughs, and (c) the time for the first election of Councilmen at large as well as the expiration of their first term of office.

In addition, alternative Section 22 contained those provisions challenged herein which provided for minority representation through a system of limited voting.

The Petition

The petition asserted that those provisions of Section 22, adopted by the voters under Question 2, which were intended to insure minority representation in the New York City Council violated both the Constitutions of the United States and of the State of New York. It did not, however, specify the particular provision of the Constitution of the United States claimed to have been violated.

The petition contained a merely conclusory allegation that a system which limited the right of all political parties or independent bodies to nominate and limited the right to vote of all electors was unconstitutional.

The Decisions Below

Upon the hearing of the proceeding, the Justice sitting at Special Term of the New York Supreme Court, New York County, held that Section 22 violated the Constitution of the State of New York. The opinion did not reach or pass upon the alleged federal question mentioned in the petition.

Upon the appeal to the Appellate Division, First Judicial Department of the New York Supreme Court, appellant stated in his brief that Section 22 of the New York City Charter in restricting "both the political party and the elector to nominate and vote for one candidate violated the 14th Amendment of the United States Constitution." The Appellate Division unanimously reversed the Court below and dismissed the proceeding, thus rejecting appellant's contention that the Charter provision contravened the 14th Amendment of the United States Constitution.

The conclusion reached by the Appellate Division was sustained by a majority of the Court of Appeals. Judge FULD, writing the prevailing opinion stated (13 N Y 2d 143):

> "Nor is there any basis for the petitioner's further contention that it violates the Fourteenth Amendment of the Federal Constitution. In our view, nothing said in *Gray* v. *Sanders* (372 U. S. 368), and certainly nothing there decided has any bearing on the case before us."

Chief Judge Desmond, dissenting, stated (13 N Y 2d 146):

> "Beyond all of this [whether the provision violated the New York Constitution] there is a real question as to whether this Charter amendment conflicts with the Fourteenth Amendment to the United States Constitution and the concept of political equality of voters so strongly asserted in *Gray* v. *Sanders* (372 U. S. 368, 380, 381, 382) with its insistence on 'one voter, one vote.'"

On October 25, 1963, Judge FULD denied appellant's application for an order restraining the conduct of the gen-

eral election on November 5, 1963, for the office of Councilman at large. Finally, on November 1, 1963, Mr. Justice Harlan of this Court denied a similar application.

The opinions of the Court of Appeals are reported in 13 N Y 2d 134 (1963), —— N. E. 2d ——.

ARGUMENT

No substantial federal question is presented by the appeal.

The provisions of Section 22, challenged herein, were fashioned to insure effective minority representation and correct the inherent defect of district representation which allows a stronger party to prevail to an extent out of proportion to its actual size. Moreover, the voters of the City of New York, recognizing the possibility of one party winning in all districts, through even distribution of a moderate majority, saw the need to strengthen the party system through the means of limited voting.

Appellant concedes this was the intent of the Section and, yet, argues that the elective procedure violates the Fourteenth Amendment. The infirmities inherent in his argument become readily apparent upon a review of those cases decided by this Court concerning claims of voting discrimination.

The equal protection clause of the Fourteenth Amendment was fashioned so that "cities, states and the Federal Government must exercise their power so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation." *Railway Express* v. *New York*, 336 U. S. 106, 112 (1949). As this Court stated in *Gray* v. *Sanders*, 372 U. S. 368, 379-380 (1963):

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote * * *. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."

Section 22 allows all electors and political bodies an equal vote and an equal right to nominate within the designated geographical unit, the borough. The restrictions are applicable to all and create no preferred class of voters or preferred political body.

The Section does not attempt arbitrarily to impair the right to vote by dilution stemming from a false tally, *United States* v. *Classic*, 313 U. S. 299 (1941); or by refusal to count votes from arbitrarily selected precincts, *United States* v. *Mosley*, 238 U. S. 383 (1915); or by the intimidation of voters, *Ex parte Yarbrough*, 110 U. S. 651 (1884); or by ballot-box fraud, *Ex parte Siebold*, 100 U. S. 371 (1880); *United States* v. *Saylor*, 322 U. S. 385 (1944).

The Section also has no similarity to decisions announcing the right of Negroes to participate equally with all other races in the electoral process—starting with *Nixon* v. *Herndon*, 273 U. S. 536 (1927), progressing through the "white primary" cases, *Smith* v. *Allwright*, 321 U. S. 649 (1944) and *Terry* v. *Adams*, 345 U. S. 461 (1953), and culminating in the attempted "gerrymandering" in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).

The reasonableness and effectiveness of the system of limited voting prescribed by Section 22 is readily discernible

from an analysis of the New York City Council as it existed prior to and after the first election held pursuant to the Charter provision. Prior to the General Election held in New York City on November 5, 1963, the composition of the Council, elected on a district basis, was 23 Democrats and 2 Republicans, or, in percentage terms, 92% and 8%. Yet, approximately 26% of the voters of the City were registered Republicans.

However, after January 1, 1964, the composition of the Council will be 28 Democrats and 7 Republicans or 80% and 20%. The system of limited voting is fairer to all and to all votes counted.

Under Section 22 the people voluntarily grant a political minority a voice more proportionate to its actual size in their legislative body. As such, the underlying philosophy is exactly opposite to that presented to this Court in *Baker* v. *Carr*, 369 U. S. 186 (1962), and other malapportionment cases, in which minorities attempt to perpetuate themselves as a majority. Directly apposite is *Hile* v. *City of Cleveland*, 266 U. S. 582 (1924) in which this Court dismissed for want of a substantial federal question an appeal from a decision of the Ohio Supreme Court sustaining the validity of a system of proportional representation for election of members of the local council whereby a vote was counted for only one candidate although several vacancies for that office were to be filled.

Appellant's further contention that Section 22 violates the due process clause of the Fourteenth Amendment is also without merit. Fundamentally the due process clause has served to absorb the basic rights of the Bill of Rights into the Fourteenth Amendment as a limitation upon the states. See cases collected in *McKay*, REAPPORTIONMENT AND EQUAL PROTECTION, 61 Mich. L. Rev. 645, p. 669, ftn. 101 (1963). Other than mentioning the due process clause

appellant does not, nor could he, develop any argument in support of the alleged violation.

The philosophy of Section 22 was aptly stated by Judge FULD when he wrote (13 N Y 2d at 143):

> "The repeated efforts of New York City extending over the last century, to provide some form of minority representation in the machinery of local government is evidence of the widespread feeling that such representation can play an important role in a democracy. Indeed, in the *Johnson* case, the court characterized it as 'an attempt to make representative government a reality' (274 N. Y., at p. 430). Be that as it may, New York's latest experiment in limited voting, approved by its inhabitants, is one which the Constitution permits it to make."

WHEREFORE appellees respectfully move that the within proposed appeal be dismissed, or in the alternative, that the order entered upon the remittitur of the Court of Appeals be affirmed.

December 10, 1963.

Respectfully submitted.

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APPENDIX A

"Minority Representation
Alternative Section 22

Application of Section

§1200. The following section shall take effect as section twenty-two of the charter proposed herewith and shall be a part thereof superseding section twenty-two as set forth therein if the system of limited voting for minority representation in the council herein provided for the election of borough-wide members of the council is approved by the electors of the city when the question is submitted to them.

Composition of Council

§22. a. The council shall consist of the president of the council and of other members termed councilmen.

b. One councilman shall be elected from each senate district as now or hereafter constituted lying wholly or partly within the city, and *two councilmen shall be elected at large from each of the boroughs.*

c. *No party or independent body as defined in the election law shall nominate more than one candidate for councilman to be elected at large in any borough.*

d. *Each elector shall have the right to vote for not more than one candidate at large and the two candidates receiving the largest number of votes in each borough shall be elected.*

e. The first election of councilmen at large shall be held at the general election in the year nineteen hundred sixty-three and the terms of councilmen so elected shall expire coterminously with those of the councilmen then in office." (Emphasis supplied.)

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